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No. _____

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IN THE

Supreme Court of the United States

HAROLD M. WIT and DONALD C. EBEL,

Petitioners,

—v.—

CAROL BERMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a state law denying a local resident the right to register and vote in a local election solely because he is registered to vote in another locality where he also resides violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Plaintiffs-appellants below, and petitioners in this Court, are Harold M. Wit and Donald C. Ebel.

Defendants-appellees below, and respondents in this Court, are:

Carol Berman, Chairperson of the New York State Board of Elections

Weyman A. Carey, President of the New York City Board of Elections

Rosanna Rahmouni, Chief Clerk of the Manhattan Borough Office of the New York City Board of Elections

Eliot Spitzer, Attorney General of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

Harold M. Wit and Donald C. Ebel, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 306 F.3d 1256 (2d Cir. 2002). The opinion is reprinted in Appendix A. The District Court dismissed petitioners' complaint after oral argument without issuing an opinion. *See* 306 F.3d at 1259. The order of the District Court is reprinted in Appendix B.

JURISDICTION

The Court of Appeals entered its judgment on October 11, 2002. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision at issue is the Equal Protection Clause of the Fourteenth Amendment: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The statutes at issue are provisions of New York's Election Law that limit the right to vote in local elections to local residents, N.Y. Elec. Law § 5-102(1); define "residence" as "*that place* where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." N.Y. Elec. Law § 1-104(22); and make it a

felony to "[r]egister or attempt[ ] to register" in more than one election district, to knowingly attempt to register "when not qualified," or to attempt to vote in an election "more than once." N.Y. Elec. Law §§ 17-104(1), (2), (5); 17-132(1), (3), (9).

The constitutional and statutory provisions are reprinted in Appendix C.

STATEMENT OF THE CASE

Facts

Harold Wit and Donald Ebel are long-time residents of New York City. Each maintains a home in New York City, pays income and property taxes in New York City, is listed in a telephone directory for New York City, uses his New York City residence for his personal financial statement, and spends a considerable portion of every year living in New York City. Both Mr. Wit and Mr. Ebel also meet the age and citizenship qualifications for voting in New York City. 306 F.3d at 1258.

Petitioners were once registered to vote, and did vote, in New York City. Each petitioner, however, also maintains a second home in Suffolk County in New York State—Mr. Wit in the town of East Hampton and Mr. Ebel in the town of Southampton. Each petitioner is currently registered to vote at that second home. Each would like to register to vote in New York City for New York City local elections while also maintaining his registration for all other elections at his Suffolk County home.

In June 2000 petitioners were advised by the New York City Board of Elections that under New York law they could not vote in New York City local elections while maintaining their Suffolk County registrations. As New York City residents, they could shift their regis-

trations from Suffolk County to New York City. But, they were told registration in two different locations—even though they were residents of both locations and sought to vote in only local elections at the second location—would be treated as election fraud.

Proceedings Below

The District Court: In June 2000, petitioners brought suit in the United States District Court for the Southern District of New York, claiming that the provisions of the New York Election Law barring them from voting in local elections in New York City solely because of their registration in another locality are unconstitutional under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. Petitioners also alleged that the ban on voting in local elections from both of their residences violated their rights under the New York Constitution. The District Court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 1367 and 42 U.S.C. § 1983.

In July 2000, before any discovery had been conducted, respondents moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On November 8, 2000, the district court (Hon. Alvin K. Hellerstein, District Judge) issued an order granting respondents' motion to dismiss. The district court did not issue an opinion.

The Court of Appeals: Petitioners appealed to the United States Court of Appeals for the Second Circuit, focusing on their federal Equal Protection Clause claim and dropping their Due Process and state constitutional claims. 306 F.3d at 1259, n.1. On October 11, 2002, the Second Circuit, in an opinion by Judge Winter joined by Judges Meskill and Straub, affirmed the District Court's dismissal of petitioners' claim.

Judge Winter's opinion began by considering the standard of review. As the court acknowledged, "[w]here a statute invidiously discriminates in granting the right to vote, we apply strict scrutiny in our review." 306 F.3d at 1259. The appeals court, however, quickly shifted gears. Relying on language from this Court's opinion in *Burdick v Takushi*, 504 U.S. 428 (1992), the appeals court noted that not all laws affecting the right to vote are subject to strict judicial scrutiny. Rather, strict scrutiny is limited only to laws that impose a "severe" restriction on voting rights. *See* 306 F.3d at 1259, *citing Burdick*, 504 U.S. at 434. Where a state election law imposes "only [a] 'reasonable, nondiscriminatory restriction[ ]' upon the rights of voters" it may be sustained if it advances "important regulatory interests." *See id., citing Burdick* at 434. Finding that the New York Election Law provisions were "reasonable, nondiscriminatory restrictions," the court of appeals applied the lower standard of review and upheld the one-residence rule. *Id.* at 1260.

In its discussion of the merits, the appeals court noted that New York's Election Law, like the election laws of most other states, treats "residence" as "synonymous" with "domicile." *Id.* at 1260-61. Although one may have multiple residences, "a person is deemed to have only a single domicile." *Id.* at 1260. Judge Winter's opinion acknowledged that "domicile is a very poor proxy for a voter's stake in electoral outcomes because many of an individual voter's varied interests are affected by outcomes in elections in which they do not vote." *Id.* at 1261. The court, however, contrasted a domicile rule with a registration eligibility rule based on the extent of an individual's interests in a community. The court concluded that an interests test "is not a manageable standard," whereas domicile, by limiting a person to a single voting place, provides a "workable" standard that has "enormous practical advantages." *Id.* at 1262. Indeed,

the court determined that election administration is "probably the dominant reason that domicile remains the dominant American method of determining where Americans may vote." *Id.* at 1263.

Of course, petitioners did not contend that they are entitled to vote in New York City because of a set of ill-defined interests. Rather, they predicated their claim on the fact that they are, in fact, residents of New York City. Indeed, although the court of appeals based its validation of the domicile ruling on administrative convenience, the court recognized that because petitioners maintain homes in two places they "are members of a class of persons that gives rise to administrative difficulties under the domicile rule." *Id.* at 1262. The court concluded that "New York has responded to this administrative difficulty in a pragmatic way," *id.* at 1262, by allowing people with two homes to "choose between them."

By contrast, the court of appeals found that allowing petitioners to vote in both of their home communities "would open the door to a host of administrative problems and potential abuses." *Id.* at 1263. The court found that a rule enabling petitioners to vote in local elections from each of their residences "would greatly increase the number of persons who might claim the right to vote in multiple elections, while thoroughly obscuring the line between valid and invalid claims." *Id.* "What is now a minimal problem [of determining residence] with the one-or-the-other rule, therefore, could become a major administrative problem without it." *Id.*

Due to the asserted administrative benefits of the requirement that petitioners may vote from just one residence—benefits that were merely assumed rather than analyzed, because no factual record had been developed in the proceedings before the district court—the court of

appeals concluded that New York's ban on voting in local elections from wherever one is a resident "does not in any sensible use of the word 'discriminate'" against people denied the right to vote in local elections from one residence because they also maintain, and vote, from a second residence. *Id.* at 1264.

REASONS FOR GRANTING THE WRIT

I. BY VALIDATING THE DENIAL OF THE RIGHT TO VOTE IN LOCAL ELECTIONS TO THE MILLIONS OF AMERICANS WHO MAINTAIN TWO HOMES, THE DECISION BELOW RAISES A QUESTION OF GREAT IMPORTANCE CONCERNING THE DEFINITION OF THE RIGHT TO VOTE

The central fact, not challenged by respondents or denied by either the district court or the court of appeals, is that petitioners are *bona fide* residents of New York City. Indeed, for purposes of considering respondents' motion to dismiss, and petitioners' appeal of the district court's grant of that motion, the respondents, the court and the reviewing courts are required to accept as fact petitioners' claims to be New York City residents. *See, e.g., Hughes v Rowe*, 449 U.S. 5, 10 (1980) (*per curiam*). In the words of this Court in an earlier case concerning the vital significance of residency in establishing constitutional protection of the right to vote, petitioners are "individuals who [a]re physically resident within the geographic boundaries of the governmental entity concerned." *Holt Civic Club v City of Tuscaloosa*, 439 U.S. 60, 68 (1978).

As residents of both New York City and Suffolk County, petitioners are among the large and growing number of Americans who maintain two homes. According to census data for 1995—the latest date for which

detailed information on this topic is available—nearly ten percent of American households, or more than nine million households, own or rent more than one residence. U.S. Census Bureau, *American Housing Survey, General Characteristics of U.S. Households* (1995). About 1.8 million households, or 1.9 percent of all households, reported that they divided their time so that both residences were their homes. *Id.* Frequently, the two homes are within less than a day's drive of each other. For sixty percent of the households with two residences, the two homes were not more than 150 miles apart. *Id.* For about 45% of the households with two residences, the second residence had been at one time the household's primary residence. *Id.*

A more recent survey focused on home ownership (without consideration of rentals) found that 5.6 million housing units were "extra" units owned in addition to the owner's usual residence. Three million of those "extra owned" units were considered "seasonal," while 2,594,000 were classified as "year-round" residences. The majority of both "seasonal" and "year-round" residences were within 150 miles of the current residence. *See American Housing Survey for the United States: 2001* (October 2002) at Table 1A-1.

Like other local residents, these second-home residents are directly and powerfully affected by the local governments that have jurisdiction over their homes. Local governments determine local property taxes, zoning and land use regulation, and the quantity and quality of police, fire, street cleaning, garbage removal, water supply, and other services local residents receive. Local residents, who happen to maintain other homes elsewhere, are just as affected by these local government decisions as other local residents. As a result, local residents—even those with second homes elsewhere—have

just as great a stake in local government actions as their fellow local residents who maintain a single home.

In a democratic society, a government's legitimacy is based on the ability of the people it governs to participate actively in the basic political decisions that shape their lives and in the election of the representatives who make and enforce the laws that regulate them. This Court has repeatedly recognized that the right to vote is "a fundamental right, because preservative of all rights," *Yick Wo v Hopkins*, 118 U.S. 356, 370 (1886), *Reynolds v Sims*, 377 U.S. 533, 562 (1964), *Harper v Virginia Board of Elections*, 383 U.S. 663, 667 (1966), *Dunn v Blumstein*, 405 U.S. 330, 336 (1972), *cf. Bush v Gore*, 531 U.S. 98, 104 (2000) (when a state legislature vests the right to vote for President in its people, the right to vote is "fundamental"). The right to vote is the crucial predicate for effective participation in democratic self-governance. The right to vote gives residents a voice in local politics and a crucial instrument for holding local officials accountable.

Without the vote, second-home residents may be effectively shut out of local politics. As a result, they may be discriminated against and forced to bear the brunt of adverse local fiscal, service, and regulatory decision-making. There is considerable evidence that localities do discriminate against second-home residents, and that second-home residents are increasingly aggrieved by their exclusion from the local polity. *See, e.g.*, Ellen Barry, *Second-Home Citizens: On Cape and Beyond, Seasonal Residents Fight to be Heard, Boston Globe*, Aug. 31, 2000, at A1; *Part-Time Residents Seek Full-Time Say, Record (N.J.)*, Aug. 21, 2000, at A3; John Flesher, *Part-Time Residents Feel Taxed by Laws, Grand Rapids Press*, Aug. 13, 2000, at A27; Fred Bayles, *'Seasonal' Residents Fight for Expanded Rights: Having a*

Say vs. Having to Pay Splits Several Vacation Towns, USA Today, May 23, 2000, at 6A; Blaine Harden, *Summer Residents Want a Year-Round Voice, N.Y. Times*, May 30, 2000, at A1. *See generally*, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 *Colum. L. Rev.* 1954, 1954-58, 1962 (2002).

Despite their considerable stake in local government, second-home residents are generally denied the vote in their second-home communities. Many states explicitly specify that, for voting purposes, a person may be a resident of a single community. *See, e.g., Alaska Stat. Ann.* § 15.05.020(3)("[t]here can be only one residence"); *Ariz. Rev. Stat. Ann.* § 16-101(B) ("[a]n individual has only one residence for purposes of this title"); *Hawaii Rev. Stat. Ann.* § 11-13 ("[f]or the purpose of this title, then can be only one residence for an individual"). Some states require a person with more than one residence to select just one residence for voting purposes, *see, e.g., La. Rev. Stat. Ann.* § 18:101(B); ("[i]f a citizen resides at more than one place in the state . . . he may register and vote only at one of the places at which he resides"); *N.J. Stat. Ann.* § 19:4-4.2 (providing opportunity for registrant to make a sworn statement concerning domicile); provide election officials with criteria for selecting which one of multiple residences is to be the single residence for voting purposes, *see, e.g., West's Ann. Cal. Elec. Code* §§ 2031, 2032. Many states, like New York, simply use terms or phrases in their election laws like "that place" which define residence in such a manner that it is clear that there may be only a single voting residence. *See, e.g., Ind. Code Ann.* § 3-5-2-42.5; *Mich. Comp. Laws Ann.* § 168.11(1). *See generally* Note, *Dual Resident Voting, supra*, 102 *Colum. L. Rev.* at 1954-55.

To be sure, a handful of states do permit second-home residents to vote in a limited number of special district elections, *see id.* at 1957, or permit local governments to extend the franchise to second-home residents at the locality's discretion, *see id. See also May v Town of Mountain Village*, 132 F.3d 576 (10th Cir. 1997) (upholding against constitutional challenge a local law authorizing nonresidents who own real property in the locality to vote in local elections); *Spahos v Mayor and Councilmen of Town of Savannah Beach*, 207 F. Supp. 688 (S.D. Ga.), *aff'd*, 371 U.S. 206 (1962) (*per curiam*) (rejecting federal constitutional challenge to enfranchisement of nonresident property owners). But in the vast majority of states and localities, individuals may vote only from a single residence.

As a result, second-home residents are consistently barred from voting in one of the communities in which they live. This leaves them much less able than other local residents to protect their interests and effectively denies them a fundamental aspect of citizenship—the right to participate on an equal basis with their neighbors in local self-governance.

II. By Failing to Subject New York's Law to Strict Judicial Scrutiny, the Court Below Broke with this Court's Precedents in Cases Involving the Right to Vote

This Court has repeatedly held that when a law that discriminates among local residents by permitting some to vote while denying the franchise to other, similarly situated residents is challenged under the Equal Protection Clause the law must be subject to strict judicial scrutiny and must be invalidated unless the State has demonstrated that its restriction on the franchise is nec-

essary to achieve a compelling state interest. *See, e.g., Harper v Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) ("classifications which might invade or restrain" the right to vote "must be closely scrutinized and carefully confined"); *Kramer v Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969) (applying "exacting judicial scrutiny of statutes distributing the franchise"); *Evans v Cornman*, 398 U.S. 419, 422 (1970) ("before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny"); *City of Phoenix v Kolodziesjki*, 399 U.S. 204, 209 (1970) (excluding some otherwise qualified citizens from the franchise "can be justified only by some overriding interest"); *Dunn v Blumstein*, 405 U.S. 330, 343 (1972) (in an equal protection challenge to a voting restriction that denies some residents the franchise "a heavy burden of justification is on the State, . . . and . . . the statute will be closely scrutinized in light of its asserted purposes.").

As the Court explained in *Kramer*, strict scrutiny is required in cases denying the franchise to some otherwise qualified voters because discriminatory voting laws subvert the democratic legitimacy which is the basis for judicial deference to state and local laws: "The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to fairly represent all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality." 395 U.S. at 628.

Strict judicial scrutiny is appropriate for state laws that limit the franchise in local elections even if the state

legislature is fairly elected: "Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting." *Id.* Where a local government like a city exercises "general responsibility and power for local affairs" and has "general governmental powers," *Avery v Midland County*, 390 U.S. 474, 483, 485 (1968), then laws limiting the local election and discriminating among local residents must be subject to strict judicial scrutiny.

In this case, however, the court of appeals failed to apply strict judicial scrutiny to New York's law. Rather, after an initial nod in the direction of strict scrutiny, 306 F.3d at 1259, the court applied a less restrictive standard of review, ultimately sustaining New York's law as "reasonable." In so doing, the court relied on this Court's decision in *Burdick v Takushi*, 504 U.S. 428 (1992), rejecting the notion that "a law that imposes *any* burden upon the right to vote must be subject to strict scrutiny." *Id.* at 432 (emphasis supplied). Rather, as *Burdick* explained, only laws that impose a "severe" restriction on the vote will receive strict scrutiny; less burdensome laws will receive less exacting review.

Burdick, however, involved the right of a qualified voter to cast a write-in vote. The Hawaii law banning write-ins at issue in *Burdick* may have burdened the vote but it did not deny anyone the right to vote. This Court has consistently held that a law flatly denying the vote to otherwise qualified adult, resident citizens is the most "severe" restriction a state can impose on the vote. Such a law is subject to strict judicial scrutiny, and will be sustained only if necessary to achieve a compelling state

interest. *See, e.g., Kramer, supra; Dunn, supra.* Less exacting review, in which an election law will be sustained if it is reasonable and linked to an important state interest, has been limited to laws, such as the write-in ban in *Burdick*, that merely limit the choices available to voters or parties but that do not deny the vote outright. *See, e.g., Timmons v Twin Cities Area New Party*, 520 U.S. 351, 358-61 (1997) (applying *Burdick* to anti-fusion law that limited party's choice of candidate; where party is free to participate in the electoral process, endorse whom it pleases, and nominate candidates to office, anti-fusion law "does not severely burden that party's associational rights").

New York's law denies petitioners the franchise in New York City. If petitioners were to re-register to their New York City homes, the New York law would deny them the right to vote in local elections in Suffolk County. Yet, petitioners are residents of both New York City and Suffolk County and have continuing, significant and legitimate ties to both places. The New York law thus places a "severe" restriction on their voting rights under *Burdick*. The court of appeals erred in applying a more deferential standard of review.

III. AS APPLIED TO PETITIONERS AND OTHER PERSONS WHO MAINTAIN TWO RESIDENCES, NEW YORK'S LAW CANNOT SURVIVE STRICT JUDICIAL SCRUTINY

The court of appeals relied exclusively on administrative convenience in determining that New York's single-place-of-voting rule passes constitutional muster. The court wisely ignored the arguments of respondents below that enfranchising petitioners to vote in local elections in both New York City and Suffolk County would somehow constitute unconstitutional "dual voting."

Enfranchising petitioners to vote in local elections in New York City and Suffolk County would not result in dual voting in the same election. Rather, petitioners would be registered to vote just once in each of two different local elections. Two votes at the local level in two different jurisdictions, with two completely different sets of offices at stake, is not dual voting in one local election. *See also* Note, *Dual Resident Voting, supra*, 102 Colum. L. Rev. at 1963.

Nor did the court find that there is anything in the nature of voting that requires that a person be allowed to vote in only one jurisdiction. As the court noted in analyzing the "concept of domicile . . . the principal usefulness of the concept is that it resolves jurisdictional issues in circumstances in which exclusivity is desirable or necessary, such as probating an estate." 306 F.3d at 1260. Yet, voting in local elections is nothing like probating an estate. It is crucial for the law of estates that the law of a single jurisdiction apply to a particular estate lest different state laws lead to inconsistent and conflicting rules for the distribution of the estate. But there is no comparable need to limit a citizen to voting in only one set of local elections. If petitioners were entitled to vote in local elections in both Suffolk County and New York City, local elections in each community would not be disturbed or confused. Their participation would not impair the ability of either community to administer its elections. Indeed, as previously noted, some jurisdictions permit second-home voting, without apparent adverse consequences to the ability of either first- or second-home communities to run their elections. *See May, supra; Spahos, supra; see also* Alexander Keyssar, *The Contested History of Democracy in America* 6 (2000) (noting that early in American history, when the franchise was based on property ownership, voting in multiple communities was permitted).

Nor did the court of appeals justify limiting the vote in local elections to a single place on the theory that an individual can be interested in or affected by the governance of just a single community. The court rejected this argument when it labeled "an oversimplification" the contention that domicile is "a close proxy for determining the election district in which a voter has the greatest stake in the outcome of elections." As the court of appeals observed, "[p]articularly in modern times, domicile is very often a poor proxy for a voter's stake in electoral outcomes because many of an individual voter's varied interests are affected by outcomes in elections in which they do not vote. . . . There are endless examples of the bad fit between domicile and a voter's interest in electoral outcomes." 306 F.3d at 1261. This is particularly true today with the large and increasing number of Americans who maintain two homes.

Rather, the court of appeals relied solely on administrative convenience in validating New York's law. *See id.* at 1261-63. Petitioners recognize that administrative convenience is a legitimate and important concern for state election laws. But, with respect to petitioners and other people eligible to vote from either of two residences, a law limiting the local vote to a single place is not narrowly tailored or strictly necessary to accomplish that state goal.

With respect to petitioners and other similarly situated residents of two communities, New York's law is both overinclusive and poorly matched to the goal of minimizing administrative difficulties. It is overinclusive because petitioners do not assert the right to vote in New York City simply because they have interests in New York City. Rather, petitioners are residents of New York City. The state would permit them to reregister in New York City provided they drop their registrations in Suf-

folk County (where they are also residents). The question of whether petitioners are residents of New York City is no different from the question presented by any other persons claiming to be residents of any community—either they maintain a home in the community or they do not. Each petitioner, as the state has acknowledged, maintains a home in New York City. The state has alleged no special administrative difficulties in determining whether plaintiffs are residents of New York City. Hence, with respect to the goal of minimizing administrative difficulties, New York's law is overinclusive as applied to petitioners.

Indeed, when applied to people with two residences New York's law is, in general, poorly matched to the goal of minimizing administrative difficulties since it creates difficulties rather than avoids them. Under New York's law, when a person has two homes both the registrant and the registrar must address the often knotty problem of determining which is the registrant's "principal" or "primary" residence. Other states have been required to devote significant statutory attention to that question. *See, e.g., West's Ann. Cal. Elec. Code* §§ 2031, 2032. That administrative complication simply does not arise if a person with two homes may vote in local elections in both communities in which he or she maintains a residence.

New York's single-place-of-voting rule may be, as the court of appeals concluded, a "reasonable" and "pragmatic" means of generally reducing the administrative burdens on election registrars. But where the right to vote is at stake "the issue is not whether the legislative judgments are rational. A more exacting standard obtains." *Kramer v Union Free School Dist., supra*, 395 U.S. at 633. A justification of administrative convenience which might pass muster under a more deferential

standard of review will fail if strict scrutiny is applied and the justification is not necessary or narrowly tailored to a compelling state interest.

This case is very similar to the durational residency requirement invalidated by this Court in *Dunn v Blumstein, supra*. The state argued that the durational requirement would promote "the purity of the ballot box" by protecting against fraud and increase the likelihood that voters were knowledgeable about local conditions. The Court accepted these as legitimate goals in election law, but found that when strict scrutiny was applied, the durational residency requirement did not satisfy "the exacting standard of precision we require." 405 U.S. at 360.

In this case, too, when strict scrutiny is applied, it is clear that the single-place-of-voting rule is not tied to the goal of administrative convenience so closely as to justify the denial of the right to petitioners, who are unquestionably residents of New York City.

IV. Supreme Court Action Is Necessary to Vindicate Petitioners' Constitutional Rights

Petitioners candidly acknowledge that this case lacks one of the important indicators of "cert-worthiness"—the existence of a conflict among the federal courts of appeals. The Second Circuit's decision is the only federal court decision to address the constitutionality of the prohibition on voting in local elections from two homes. The issue, however, is ripe for Supreme Court action. Indeed, Supreme Court action is necessary to vindicate the constitutional rights of petitioners and the many other citizens who have more than one residence.

The court of appeals' decision is significant because it is the first federal judicial decision to legitimate the denial of second-home voting rights, and to reach that

outcome by applying a less-than-strict standard of review. Although the voting rights of second-home residents have generally been denied by state laws and local administration, the Second Circuit's decision for the first time places the imprimatur of the courts on this practice. As a result of the court of appeals' decision, disfranchisement of second-home residents has now been legitimated as constitutional.

More importantly, the court of appeals' decision demonstrates that the Supreme Court's leadership is necessary to address this important question of voting rights. Although the case involves a law flatly denying residents the right to vote in second-home localities, the court of appeals declined to apply strict judicial scrutiny. Although the court of appeals rested its validation of the law on administrative concerns, the court did not explain why, for persons with two homes, a two-residence voting rule is less administrable than a single-place-of-voting rule, given that the two-residence rule obviates the need to decide which residence is the primary residence. So, too, despite the centrality of administrative concerns to its analysis, the court of appeals affirmed the district court's grant of a motion to dismiss the complaint, thus precluding the discovery and other factual development, not to speak of a full trial in which petitioners could offer evidence on the question of administrability.

This case demonstrates the tension between such a widespread feature of election law as the single-home voting rule and the Equal Protection Clause. This Court has repeatedly emphasized the fundamental nature of the right to vote in one's community of residence and required that laws restricting the rights of otherwise qualified residents to vote be subject to the most exacting review. At a time when millions of Americans maintain two residences, the single-home voting rule limits

the ability of second-home residents to participate on an equal basis with their neighbors in local self-governance and it exposes them to discrimination and exploitation in local taxation, regulation and service delivery. It is apparent that this Court's leadership will be necessary if the laws restricting the voting rights of petitioners and millions of other similarly situated Americans are to receive the strict judicial scrutiny that this Court's voting rights jurisprudence requires.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 6, 2003

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: August 28, 2001 Decided: October 11, 2002)

Docket No. 00-9482

HAROLD M. WIT and DONALD C. EBEL,

Plaintiffs-Appellants,

—v.—

CAROL BERMAN, Chairperson of the New York State Board of Elections, WEYMAN A. CAREY, President of the New York City Board of Elections, ROSANNA RAHMOUNI, Chief Clerk of the Manhattan Borough Office of the New York City Board of Elections, and ELIOT SPITZER, Attorney General of the State of New York,

Defendants-Appellees.

Before:

MESKILL, WINTER, and STRAUB,

Circuit Judges.

Appeal from a dismissal by the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*) of appellants' complaint alleging that the New York State Election Law violates the equal protection rights of citizens who have homes in multiple communities by denying them the right to vote in multiple local elections. We hold that appellants have failed to allege impermissibly differential treatment of similarly situated individuals under the Election Law. Accordingly, we affirm.

RICHARD A. BRIFFAULT, Columbia Law School, New York, New York (Michael B. Gerrard, Craig A. Stewart, Emma K. Lewis, Kerry A. Dziubek, Arnold & Porter, New York, New York, of counsel; Gerald E. Frug, Harvard Law School, Cambridge, Massachusetts, of counsel), *for Plaintiffs-Appellants*.

MELANIE L. OXHORN, New York State Office of the Attorney General, New York, New York, TODD D. VALENTINE, New York State Board of Elections, Albany, New York (Eliot Spitzer, Attorney General of the State of New York, New York, New York, of counsel; Michael D. Hess, Corporation Counsel, City of New York, New York, New York, of counsel), *for Defendants-Appellees*.

Patricia C. Kakalec (Daniel Werner, of counsel), Farmworker Legal Services of New

York, Inc., New Paltz, New York, *for Amicus Curiae Farmworker Legal Services of New York, Inc.*

WINTER, *Circuit Judge*:

Harold M. Wit and Donald C. Ebel appeal from the dismissal of their complaint by Judge Hellerstein for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The complaint alleged a violation of appellants' rights to equal protection of the laws under the federal and state constitutions. We affirm, holding that the New York State Election Law ("Election Law") does not impermissibly deny citizens who have homes in multiple communities the right to vote in multiple local elections.

BACKGROUND

Each appellant has maintained a home in New York City for over forty years. Each pays income and property taxes in the City, owns real property there, is listed in the New York City telephone directory, uses his New York City residence for personal financial statements, and spends a considerable portion of every year living there. In addition, each appellant meets other qualifications—age and citizenship—to register to vote in New York City.

Appellants were once registered to vote in New York City and voted there. However, for some years, both have also lived, and have been registered voters in, the towns of East Hampton and Southampton, respectively. Appellants are currently barred from voting in New York City because they are also registered to vote in the Hamptons. Each alleges that, if they were not registered

to vote in the Hamptons, they would be allowed to register in New York City.

Under New York law, one must be a resident of an electoral district to register as a voter in that district. "Residence" is defined in the Election Law as "*that place* where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." N.Y. Elec. Law § 1-104(22) (emphasis added). Section 17-104 of the Election Law provides that any person who "[r]egisters or attempts to register as an elector in more than one election district for the same election" is guilty of a felony. N.Y. Elec. Law § 17-104(2), (5). Other sections of the Election Law also impose felony penalties on those who knowingly attempt to register "when not qualified" and on those who attempt to vote in an election "more than once." N.Y. Elec. Law § 17-132(1), (3), (9).

In June 2000, appellants filed the present complaint challenging the constitutionality of the pertinent provisions of the Election Law and seeking declaratory and injunctive relief permitting them to register to vote in local elections in New York City while maintaining the right to vote in the Hamptons. The complaint claims that the Election Law, as written and enforced, violates the Equal Protection Clause because it denies appellants the right to register to vote in elections in New York City even though, save for New York defining residency for voting purposes as the location of one's single permanent home—"that place"—they possess the same indicia of residency as those residents of New York City who are deemed qualified to register to vote. The complaint also asserts that the Election Law infringes on appellants' federal constitutional rights to due process of law and intrastate travel as well as their rights under various provisions of the New York Constitution.

In July 2000, appellees moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). After oral argument, the district court granted the motion to dismiss. On appeal, appellants renew their federal equal protection claim.[1]

DISCUSSION

We review a dismissal under Rule 12(b)(6) *de novo*, with all inferences drawn in favor of the nonmoving party. *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 (2d Cir. 1999).

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1. At oral argument, we called appellants' attention to the fact that appellants' complaint states three claims arising under the New York State Constitution and three claims arising under the federal Constitution. We noted our concern that state constitutional claims might need to be resolved in advance of addressing the federal constitutional claims. *See Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring in the judgment) ("The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law." (quoting *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981)). Appellants acknowledged that the district court decision disposed of the state constitutional claims and effectively conceded that by limiting their argument on appeal to federal constitutional claims, they were dropping their state constitutional claims. *See United States v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994) (per curiam) ("It is well established that 'an argument not raised on appeal is deemed abandoned.' ") (citing *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992)); *Herrmann v. Moore*, 576 F.2d 453, 455 (2d Cir. 1978) ("In his brief in this court plaintiff limits the questions presented to his claims under [federal statutes]. We, therefore, rule that he has abandoned any claims which do not involve alleged violations of those statutes.").

Where a statute invidiously discriminates in granting the right to vote, we apply strict scrutiny in our review. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-28 (1969). However, although "voting is of the most fundamental significance under our constitutional structure . . . [i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). As the Court elaborated in *Burdick*:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.

Id. (citation omitted) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The *Burdick* Court went on to state that where voting rights are subjected to "severe" restrictions, regulations must be "narrowly drawn to advance a state interest of compelling importance," *id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)), but that where a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Id.* (quoting *Anderson*, 460 U.S. at 788).

For reasons discussed *infra*, we uphold the provisions of the Election Law challenged by appellants because those provisions impose only "reasonable, nondiscriminatory restrictions" and advance important state regulatory interests.

An Equal Protection claim must be based on impermissible differential treatment. *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). The differential treatment alleged here is that, because appellants are otherwise qualified under New York law to register in both New York City and the Hamptons, the provision of the Election Law prohibiting them from registering in two places treats them differently than the qualified voters in the election district in which they are not registered. To put it another way, appellants are not allowed to vote in New York City solely because they are registered in the Hamptons. Were they to give up their registration in the Hamptons, they could register in New York City. Therefore, they argue, they are being treated differently than others qualified to vote in the City. Because there is in their view no permissible governmental interest justifying this differential treatment, they conclude that they have been denied their rights under the Equal Protection Clause. We disagree.

The Election Law states that no person may vote unless a "resident" of the particular election district. N.Y. Elec. Law § 5-102(1). Residence and the legal concept of domicile are synonymous under the Election Law. *See Hosley v. Curry*, 85 N.Y.2d 447, 451 (1995) (stating that the terms "resident" and "inhabitant" are "properly understood to be synonymous with domicile") (citing *Palla v. Suffolk County Bd. of Elections*, 31 N.Y.2d 36, 47 (1972)); *Auerbach v. Rettaliata*, 765 F.2d 350, 351 (2d Cir. 1985) (stating that under New York law the definition of "residence" for voting purposes is

"intended to approximate the test for domicile"); *see also McGrath v. Kristensen*, 340 U.S. 162, 175 (1950) (" 'Residence' sometimes equals domicile, as in voting"); Restatement (Second) of Conflict of Laws § 11(1) cmt. D (1989) ("Under the local law of many states, the county or other political subdivision where a person is domiciled is the place where . . . he may vote . . . .").

New York's rule against voting in two election districts reflects a critical aspect of the concept of domicile. The principal usefulness of the concept is that it resolves jurisdictional issues in circumstances in which exclusivity is desirable or necessary, such as probating an estate. Although one may be legally domiciled in different places for different legal purposes, a person is deemed to have only a single domicile for the particular legal purpose for which the concept is then being used. *See, e.g.*, Restatement (Second) of Conflict of Laws § 11(2) (1989) ("Every person has a domicil at all times and, at least for the same purpose, no person has more than one domicil at a time."); *California v. Texas*, 437 U.S. 601, 611 (1978) (noting, in estate tax context, the general state law principle that "it is possible to have only one domicile"); *Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting in immigration law context that "a person may have only one domicile"); *In re Estate of Newcomb*, 192 N.Y. 238, 250 (1908) (stating that a person may have only one domicile).

For purposes of voting in New York, domicile is defined as "that place" where one has the fixed, permanent, and principal home to which, even with extended periods of living elsewhere, one intends to return. N.Y. Elec. Law § 1-104(22) ("The term 'residence' shall be deemed to mean that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to

return."); *see also Hosley*, 85 N.Y.2d at 451 ("Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect." (quoting *In re Newcomb's Estate*, 192 N.Y. 238, 250 (1908)). When a person's domicile determines where that person can vote, therefore, it must be a single electoral district.

The domicile test for determining where citizens may vote dominates the election laws of most states. *See* William H. Danne, Jr., Annotation, *Residence of Students for Voting Purposes*, 44 A.L.R.3d 797 § 2 (1972) (observing that "[i]t is a matter of virtually uniform recognition" that, where state constitutional and statutory provisions limit the right to vote to the residents of a given geographical area, "the term 'residence' should be equated with the concept of domicil"); Restatement (Second) of Conflict of Laws § 11(1) cmt. k (1989) (noting that "residence" is generally interpreted as being the equivalent of "domicil" when used in state statutes relating to voting).

The reasons for the reliance upon domicile are quite pertinent to the issue before us. At first blush, it may seem that domicile plays such a key role because it is a close proxy for determining the election district in which a voter has the greatest stake in the outcome of elections. This is an oversimplication, however.

Particularly in modern times, domicile is very often a poor proxy for a voter's stake in electoral outcomes because many of an individual voter's varied interests are affected by outcomes in elections in which they do not vote. Some, or even many, voters may reasonably perceive that their primary political concerns are affected more by outcomes in elections in which they do

not vote than by outcomes in elections in which they do vote. There are endless examples of the bad fit between domicile and a voter's interest in electoral outcomes. For example, a person who works in a factory, or owns one, located in a municipality other than where the person lives, has interests in that municipality's tax, traffic, law enforcement, and other policies. To take an interstate example, many voters in New England believe that their lives are directly affected by environmental policies in the mid-west industrial states.

However, while one may mount ethereal arguments against the single-domicile-registration rule, the administrative problems that interests-based rules would cause for thousands of registrars of voters render those rules virtually unthinkable. Voter registration is generally a nondiscretionary function of local government carried out by low level officials. Absent meaningful guidance, some registrars (even in the same precinct) would use a "whatever-you-say" approach, others will adopt a "show-me-beyond-a-reasonable-doubt" stance, while yet others will resort to *ad hoc*, *ad hominem*, or whimsical standards.

Given the need for workable standards, determination of where one may vote based on interests in electoral outcomes is not a manageable rule. Honoring the desires of voters to vote in other districts based on their expression of subjective interests in the political decisions of those other districts would essentially lead to a "vote-in-however-many-districts-you-please" rule. Such a rule would be truly chaotic, save for the small measure of order that corruption would bring to it. An objective test of voter interests is equally unworkable. At the very least, it would involve an ever-changing analysis by registrars of the merits of political issues—e.g., does an employee of a firm in one city who lives in another have a sufficient interest in the traffic and tax policies of the

former to vote there, or is there sufficiently harmful acid rain in Vermont as a result of loose environmental standards in Ohio to justify a Vermonter voting in Ohio[2]—and would also be chaotic.

Domicile as a rule may have its philosophical defects, therefore, but it has enormous practical advantages over the alternatives. It almost always insures that a voter has *some* stake in the electoral outcome in the domiciliary district and almost always does not involve large numbers of disputes over where one may vote. The domicile rule informs would-be voters where they may vote, a vital function that encourages registration and voting. Moreover, it gives voters the notice required for the enforcement of criminal laws against individuals voting in places where they are not eligible. *See* N.Y. Elec. Law § 17-132.

The New York domicile rule also provides substantially workable standards for registrars of voters as to whether would-be voters are or are not entitled to register. The vast majority of voters have a principal residence in which they have lived for thirty days. Were registrars of voters required to apply a more philosophically satisfying rule with multiple individual voting districts based on concepts such as a voter's stake in the outcome or simply the frequent presence of a voter in the district, each election would have the potential for massive disputes over registration and the legitimacy of election results. Legal bright lines will always be under- or over-inclusive, but chaos is hardly preferable.

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[2] This would be a somewhat unusual, interstate equal protection claim, i.e. Ohio may not allow persons resident there to vote while denying that right to persons from other states who have an equal or greater interest in the electoral outcome. Nevertheless, an interests rule for determining where individuals may vote would seem to support such a claim.

To be sure, domicile as a test entails administrative difficulties at the margins. The domicile of students is an example. *See, e.g., Auerbach*, 765 F.2d at 351; Danne, Jr., *Residence of Students for Voting Purposes* § 2, *supra*. So too is the registration of the homeless. *See, e.g., Pitts v. Black*, 608 F. Supp. 696, 709-10 (S.D.N.Y. 1984). However, these difficulties are slight compared to those that abandonment of the domicile rule and its one domicile/one electoral district restriction might entail.

Appellants are members of a class of persons that gives rise to administrative difficulties under the domicile rule. Their problem is the opposite of the homeless problem because appellants have multiple homes, there is doubt as to which home is "that place" for domiciliary purposes. New York has responded to this administrative difficulty in a pragmatic way. New York courts have held that, rather than compel persons in appellants' circumstances to establish to the satisfaction of a registrar of voters or a court that one home or the other is their principal, permanent residence, they can choose between them. *See People v. O'Hara*, 96 N.Y.2d 378, 385 (2001) ("[A]n individual having two residences may choose one to which she has 'legitimate, significant and continuing attachments as her residence for purposes of the Election Law.' " (quoting *Ferguson v. McNab*, 60 N.Y.2d 598, 600 (1983)). This pragmatic approach lessens the burdens on registrars, who in most cases need only verify an address, and on people like appellants, who otherwise might be turned down at both places and have to go to court in order to be able to vote anywhere. New York's solution to the multiple home problem is, therefore, quite favorable to appellants and hardly one that can be said to disadvantage them.

Moreover, even if appellants were right, the proper remedy for a federal court to order would not be to com-

pel New York to allow appellants to vote in two places. Rather, we would have to order New York to choose between enforcing a strict, single domicile rule, which we believe to be clearly constitutional, *see Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *Evans v. Cornman*, 398 U.S. 419, 422 (1970), or a version of appellants' suggested multiple homes/multiple votes rule.

In any event, we see no infirmity in the one-or-the-other rule because a multiple-vote rule would open the door to a host of administrative problems and potential abuses. Abandonment of the one-or-the-other rule in favor of an as yet unarticulated standard that vaguely emphasizes time spent in different communities, including (or not including) a significant number of overnights, would greatly increase the number of persons who might claim the right to vote in multiple elections, while thoroughly obscuring the line between valid and invalid claims. Some people lease or own homes or apartments in particular towns year-round but use them only for a few weeks or months in the summer or winter. Many more may lease a house or apartment for only a particular season. Because of the one-or-the-other rule, such persons do not (or rarely so) seek to vote in such towns. Without such a rule, however, many such persons might claim sufficient residence to justify their voting in multiple places, and registrars of voters would have to adjudicate these claims.

In this regard, appellants offer no workable standard to replace a strict domicile test modified by the one-or-the-other rule. Instead of articulating a test or applicable standards, they rest solely on their assertion that their connections with New York City would be sufficient to allow them to vote there were they not registered in the Hamptons, where they have equally sufficient connections. A workable definition of the minimal connections

with an election district that are sufficient to trigger a constitutional right to vote in that community as well as elsewhere is not articulated.[3]

What is now a minimal problem with the one-or-the-other rule, therefore, could become a major administrative problem without it. The potential difficulties should not be underestimated. Registrars would be called upon to determine, according to criteria not found in appellants' papers, whether a would-be registrant has spent "enough" overnights—or perhaps enough workdays or vacation days—in a district to register. These decisions, moreover, would often have to be made in a very short time frame. Finally, this is no imaginary horrible, because some political organizations might well find it in their interests to attempt to register large numbers of persons with only marginal connections to the electoral district.

The need to avoid these problems, which can grow from a tangle to a morass to outright chaos, is probably the reason that domicile remains the dominant American method of determining where persons may vote. New York's granting to persons such as appellants the benefit of the doubt by using a one-or-the-other rule does not undermine the important governmental interests served by the domicile rule and allows appellants to choose freely, rather than compelling them to establish their domicile in only one place. The one-or-the-other rule does not in any sensible use of the word

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[3] Appellants do not rely upon home ownership in two communities as the decisive fact dividing those who can and cannot vote in two communities, a rule that surely would be challenged by non-homeowners. Rather, they use home ownership as evidence of a connection that, along with substantial time spent in New York City, is sufficient in their view to require that they be allowed to vote in the City as well as in the Hamptons.

"discriminate" against appellants. Indeed, the Election Law's permissive approach allows appellants to align their strongest, personal political interests with the appropriate voting location. In light of this enhancement of appellants' voting power, the fact that the Election Law does not go further by multiplying appellants' voting power in light of their claimed multiple local interests is not a compelling ground for a claim of discriminatory treatment. *Cf. McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 811 (1969) (declining to invalidate a remedial election law on the ground that it "has not gone still further," noting that such legislation need not "strike at all evils at the same time").

CONCLUSION

For the reasons stated above, we affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 4324 (AKH)

HAROLD M. WIT and DONALD C. EBEL,

Plaintiffs,

—against—

CAROL BERMAN, Chairperson, New York State Board of Elections, WEYMAN A. CAREY, President or the New York City Board of Elections, ROSANNA RAHMOUNI, Chief Clerk of the Manhattan Borough Office of the New York City Board of Elections, and ELIOT SPITZER, Attorney General of the State of New York

Defendants.

SUMMARY ORDER

ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on Defendants' Motion to Dismiss pursuant Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated on the record, the motion is granted.

The Clerk of the Court shall mark this case as closed.

SO ORDERED.

Dated: New York, New York
November 8, 2000

/s/ ALVIN K. HELLERSTEIN
ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 4324 AKH

HAROLD M. WIT and DONALD C. EBEL,

Plaintiffs,

—v.—

CAROL BERMAN, et al.,

Defendants.

New York, N.Y.
November 8, 2000
4:15 P.M.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

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MICHAEL GERRARD

TODD VALENTINE
Attorney for Defendant Berman

NEW YORK STATE ATTORNEY GENERAL'S OFFICE
Attorney for Defendant
JOEL GRABER

NEW YORK CITY CORPORATION COUNSEL
Attorney for Defendants NYC Board of Elections, Carey & Rahmouni
PAUL PARKS

MOTION

[2] THE COURTROOM DEPUTY: Harold Wit and Donald C. Ebel v. Carol Berman, et al.

MR. STEWART: Craig Stewart, Arnold & Porter with Michael Gerrard for the plaintiffs.

MR. VALENTINE: Todd Valentine for Carol Berman and New York State Board of Elections.

MR. MARKS: Paul Marks for defendants Carey and Rahmouni for the New York City Board of Elections.

MR. GRABER: Joel Graber for the New York State Attorney General.

THE COURT: Let's deal with the situation we have. I think I'll just address Arnold & Porter first. How does a person get two domiciles?

MR. STEWART: You don't get two domiciles, your Honor, you get two residences. But we concede—is it all right if I stand here?

THE COURT: Yes.

MR. STEWART:—that under the law of the State of New York, voting is equated with domicile. Voter eligibility, there's no dispute about that, that's the main point that the State Board makes in its brief here. Our point is a different point, and a point that they acknowledge, which is that one can have two residences, and indeed, under the law, the Supreme Court has taken the position that residence is defined by one's geographic presence. indeed in New York, even cases [3] interpreting the New York State statute, Election Law 104 subsection 22, say one can have more than one residence, the very point that Mr. Valentine made in his reply brief, but has to choose between those residences in deciding where to vote.

And our point is simply this, that while that may be fine for elections that are state elections or federal elections, it's not appropriate, it's a line that's too strict for local residents, for *bona fide* local residents voting in municipal elections in a place in which they are *bona fide* residents, such as in this case, New York City.

Our position is then, your Honor—

THE COURT: Let's say it's a race for the state assembly.

MR. STEWART: Our position would be that you couldn't vote in that. That would be a statewide ballot. You would have two votes then in the same election. What we're talking about—we are not talking about, and let me be clear about this because this is a point that Mr. Valentine made in his motion and one that we tried to respond to in our opposition, we are not asking for the opportunity to vote twice in the same election, that being an election for the same statewide legislative body, a federal legislative body, a ballot proposition that is statewide. We are not asking for that right. We understand the State's concern.

THE COURT: What's the highest race that you think [4] you could vote for in two or three places?

MR. STEWART: Let's take the case that we have, our case, Mayor of the City of New York.

THE COURT: You can vote for the Mayor of the City of New York in Manhattan and you can vote for the Mayor of East Hampton in the Hamptons.

MR. STEWART: Yes.

THE COURT: You can vote for the Mayor in Manhattan in the morning and you get in your car and you vote for the Mayor of East Hampton in the afternoon. And since

you're passing buy, if you have another home in West Hampton, you can vote there.

MR. STEWART: This is the obvious—

THE COURT: Why not, right?

MR. STEWART: Because you're not a *bona fide* resident.

THE COURT: You split your time. July in West Hampton and August in East Hampton.

MR. STEWART: That's a decision that the State gets to make. The State can say are you a *bona fide* resident. That's what happened in *Dunn v. Blumstein*.

THE COURT: So you can vote in three places.

MR. STEWART: In as many places as the State finds you to be a *bona fide* resident.

THE COURT: Can you vote in Babylon?

[5] MR. STEWART: If you are a *bona fide* resident.

THE COURT: Plainview.

MR. STEWART: You may reach the point, your Honor, where you couldn't possibly be a *bona fide* resident.

THE COURT: What makes a *bona fide* resident?

MR. STEWART: *Gesser v. Lasher*, and Election Law 5-104 talk about the indicia of *bona fide* residence, and in fact *Dunn v. Blumstein* talks about the things that the State can look to. They can look to leaseholds, property interest, mail collection, there are any number of indicia that one can look to, but the State gets to make that determination.

We're not contesting that. We're not saying that the State can't make that determination. indeed, the State

could say that the plaintiffs in this case are not *bona fide* residents. But what the State says is you never get there.

THE COURT: You have to choose. I understand.

MR. STEWART: The State says you have to choose for all elections, including local elections. It is that last bit that we contend is unconstitutional. We don't say that we should be voting for two separate State assembly positions.

THE COURT: You can vote for Mayor in three places, why not State assembly?

MR. STEWART: That's one legislative body. These are positions of local concern. The Mayor of the City of New York, Town Council in East Hampton, that's a local concern. **[6]** When you look at *City of Holt Civic Club v. City of Tuscaloosa*—

THE COURT: How about for justice of the Supreme Court?

MR. STEWART: I'm sorry, I misunderstood your question.

THE COURT: Can you vote for justice of the Supreme Court in Suffolk County, Nassau County, Queens County and New York County if you have homes in each of those places?

MR. STEWART: If you're a *bona fide* resident, and I should be able to say with more certainty, but I think the answer would be yes, your Honor. You can vote in local—matters of local concern you can vote. You can't vote in a statewide referendum or the proposition that was defeated, I think yesterday, the transit bond. You couldn't vote on that, that was a statewide ballot proposal and you couldn't do that. But if you had something that was a City Council issue here and Town Council in

East Hampton, yes, you could vote for those races. That's the limited purpose for which we're saying the State's rule violates the Constitution.

THE COURT: What's the Constitution proscription?

MR. STEWART: We're saying it's a violation of various rights, but most fundamentally the equal protection clause, because what the State has done is engage in line-drawing with respect to a fundamental right, the right to [7] vote by *bona fide* residents. In *Holt Civic Club*, the court summarized it's prior teachings in this and said: What we have done is set in the case of elections, or laws that attempt to circumscribe the right of residents located within a geographic boundary to vote, we've applied strict scrutiny analysis. Here there is no question, at least on this motion, on a 12(b)(6) motion, that the plaintiffs are residents of New York City and are also residents of—

THE COURT: What's the equal protection? Who is discriminated against?

MR. STEWART: They're being discriminated against because citizens or residents of New York City who are similarly situated, who have no greater indicia of residence in New York City than these plaintiffs, are permitted to vote in local elections here and they are not permitted to vote in local elections here.

THE COURT: They certainly can if they elect to have their domiciliary in New York.

MR. STEWART: Then they're not permitted to vote in the other community.

THE COURT: But everybody who is a dual resident is similarly charged with a requirement to choose.

MR. STEWART: Right. But your Honor asks who is discriminated against, they are discriminated against by virtue of the fact that they are dual residents and therefore, [8] anybody who is just a resident of New York City, who has no greater connection here but domicile, gets to vote here in New York City in local elections, they, because they're *bona fide* residents here and in another community, are prohibited from voting here in local elections.

THE COURT: I don't agree with you.

MR. STEWART: I'm sorry, your Honor.

THE COURT: I don't accept the argument. It just doesn't make sense to me. It's inconsistent with our form of government that one person is the equal of any other, whether you own 17 homes or just one home or don't own a home at all. What you want to do is make a special class of wealthy people who can do what they want in different places.

MR. STEWART: Absolutely not. Even if your Honor ends up disagreeing with where we are legally, I want to make sure that I'm clear on this point. Our position would apply to anyone, whether they own homes or not. You could have people who rented, who are teachers in South Hampton during the year and decided to leave South Hampton or East Hampton in the summer and reside somewhere else. It would apply to those people too. They're not particularly wealthy. In this instance, we're saying these people, this is the clearest case—

THE COURT: It reminds me of in 1960 I belonged to a political club and the way we matched our budget to our [9] expenditures was to open up our elections to whoever wanted to come and vote. You paid your dues, you

voted. So it didn't make a difference if you belonged to a different political club, it was open.

The Town could make up its political budget, its budget by opening up its politics. it doesn't make sense. *In Re Newcombe Estates* holds very clearly that there's a requirement under New York law to select a domicile—*192 N.Y. 238*—which equates the obligation of residence with the obligation of domicile. That's good law. We have Judge Friendly in the case of *Auerbach v. Rettaliata*, 765 F.2d 315 (2d Cir. 1985) holding with respect to students that the student has to choose between his domicile as a resident of his college and his home, and that, of course, is between different states. But the same policy holds within a state.

I hold that the motion to dismiss is granted, that there is no legal basis for finding a violation of the equal protection clause or any other clause of the United States Constitution.

Thank you, very much.

(Record closed)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment provides in part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

2. New York Election Law § 5-102(1) provides:

§ 5-102. Qualifications of voters; age and residence

1. No person shall be qualified to register for and vote at any election unless he is a citizen of the United States and is or will be, on the day of such election, eighteen years of age or over, and a resident of this state and of the county, city or village for a minimum of thirty days next preceding such election.

3. New York Election Law § 1-104(22) provides:

§ 1-104. Definitions

* * * *

22. The term "residence" shall be deemed to mean that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return.

4. New York Election Law § 17-104(l), (2) and (5) provide:

§ 17-104. False registration

Any person who:

(1) Registers or attempts to register as an elector in more than one election district for the same election, or more than once in the same election district; or

(2) Registers or attempts to register as an elector, knowing that he will not be a qualified voter in the district at the election for which such registration is made; or

* * * *

(5) Knowingly permits, aids, assists, abets, procures, commands or advises another to commit any such act, is guilty of a felony.

5. New York Election Law § 17-132(l), (3) and (9) provide as follows:

§ 17-132. Illegal voting

Any person who:

(1) Knowingly votes or offers or attempts to vote at any election, when not qualified; or,

* * * *

(3) Votes or offers or attempts to vote at an election, more than once; or votes or offers or attempts to vote at an election under any other name than his own; or votes or offers or attempts to vote at an election, in an election district or from a place where he does not reside; or,

* * * *

(9) Falsely pretends or represents to the inspectors of election or any of them that he is incapacitated to mark his ballot, for the purpose of obtaining assistance in voting under the provisions of this chapter, is guilty of a felony.

Any offer or attempt under this section shall be deemed to be the doing of any act made necessary by this chapter preliminary to the delivery of a ballot to an elector or the deposit of the ballot in the ballot box or his admission to the booth or voting machine enclosure.